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No. 03-1552

IN THE
Supreme Court of the United States

MAINSTREAM MARKETING SERVICES, INC., ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. The Opposition Does Not Address the Important Doctrinal Issue Presented

1. The Government's Opposition avoids entirely the primary doctrinal issue presented: Whether the First Amendment permits the government to impose regulations that discriminatorily restrict commercial speech in order to serve an asserted interest unrelated to the commercial nature of the speech. The answer to this question determines whether the intermediate scrutiny of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), even applies – a conclusion the government simply assumes. Brief for the Respondent in Opposition ("Opp.") at (i), 13-17. Rather than addressing the issues set forth in the Petition, the government mischaracterizes them, claiming that Petitioners argue only that the national "do-not-call" registry ("DNCR") is fatally underinclusive. Opp. 12, 17. It acknowledges that various Members of the Court have questioned *Central Hudson's* "paternalism," Opp. 19, which, of course, is true, but entirely beside the point. The issue here is not the well-settled matter of "paternalism," nor is it simply whether the rules are underinclusive. The issue is the government's effort to hide behind *Central Hudson's* relaxed scrutiny by "distinguish[ing] among the indistinct." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 195 (1999).

Members of this Court frequently have questioned whether "regulations not directed at the content of commercial speech or adverse effects stemming from that content should be evaluated under the standards applicable to regulations of fully protected speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 436 (1993) (Blackmun, J., concurring); *id.* at 416 n.11 ("a regulation that is not . . . directed [at commercial harms] should be evaluated under the standards applicable to regulations on fully protected speech"). As Justice Stevens described the decision in *Discovery Network*, the Court invalidated a ban that "attached too much importance to the distinction between commercial and noncommercial speech" because the interest served "bore no relationship whatsoever to the prevention of *commercial harms*." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 n.12 (1996) (plurality op.) (emphasis added). *See also id.* at 499, 504 (advertising restrictions that do not protect consumers from

"commercial harms" must be scrutinized with "special care" and "rarely survive constitutional review"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491-492 (1995) (Stevens, J., concurring) ("the 'commercial speech doctrine' is unsuited to this case, because [the law] neither prevents misleading speech nor protects consumers from the dangers of incomplete information"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (Kennedy, J., concurring) (*Central Hudson* "gives insufficient protection to truthful, non-misleading commercial speech"); *id.* at 576 (Thomas, J., concurring) (whatever the continuing validity of *Central Hudson*, "it is limited to the peculiarly *commercial* harms that commercial speech can threaten") (emphasis in original). *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (regulation within categories of speech that receive limited First Amendment protection is restricted to the reason why such speech is constitutionally proscribable). [1]

This question was fully briefed, Pet. 17-22, but was met with silence from the government. So, too, did the Opposition ignore the fact that the cases analyzing restrictions on unwanted communications have nothing at all to do with commercial speech. *Id.* at 14-17. If anything, the government unwittingly supports Petitioners' argument on this point by citing noncommercial speech cases to substantiate its "overriding interest" in protecting privacy. Opp. 14 (citing *Hill v. Colorado*, 530 U.S. 703 (2000) (abortion protest); *Frisby v. Schultz*, 487 U.S. 474 (1988) (residential picketing); *Carey v. Brown*, 447 U.S. 455 (1980) (labor picketing)). Yet despite the complete absence of any distinctly "commercial" interest, the Opposition continues to justify its discriminatory rules based on heightened constitutional protection for noncommercial and political speech. Opp. 7, 18.

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[1] The Opposition's claim that circuit courts consistently read *Discovery Network* only as a case on underinclusiveness is wrong. *Compare* Opp. 19-20, with *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998) (citing *Discovery Network* to invalidate discriminatory solicitation ban after first upholding it); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (citing *Discovery Network* to strike down discriminatory broadcast regulation); *Rappa v. New Castle County*, 18 F.3d 1043, 1079 (3d Cir. 1994) (invalidating sign law because it "impermissibly discriminates").

2. The government's unwillingness to address the central constitutional issue is highlighted by its characterization of the "commercial speech" problem as nothing more than a simple empirical question. It presents the DNCR not as a remedy for asserted harms of commercial speech, but instead as a response "to a problem caused primarily by commercial entities." Opp. 18. Framing this issue in this way underscores the government's internal contradictions as well as the stark deficiencies in the record, regardless of whether this Court applies strict scrutiny or *Central Hudson's* intermediate test.

The government acknowledges that noncommercial calls involve precisely the same "intrusion" issues as commercial calls, and even defends other new regulations by citing this fact. A brief to the United States Court of Appeals for the Fourth Circuit (ironically filed *the same day* as the Opposition), in which the government defended the application of company-specific "do-not-call" rules to professional charitable fundraisers, notes that the FTC "concluded during the rulemaking, based on the administrative record, that consumers' privacy rights are infringed by telemarketing calls seeking charitable contributions: '[C]onsumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution . . . A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities.' 68 Fed. Reg. at 4637 & n.685."[2] This point was reinforced by various members of Congress when they authorized funding for the DNCR.[3]

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[2] Brief of Defendant-Appellee Federal Trade Commission, *National Fed'n of the Blind v. FTC*, No. 04-1378 (4th Cir., filed July 19, 2004) at 45. The record before the agencies and such arguments before other tribunals rest uncomfortably with the government's representations to this Court regarding "consumers who expressed their dissatisfaction with *only* commercial telemarketing to the FTC and FCC." Opp. 18 (emphasis added).

[3] Do Not Call List Authorization Hearing, Jan. 8, 2003 at 7. *See also id.* at 32 (statement of Chairman Tauzin) ("I personally am offended by all the recorded calls from politicians ... I know a lot of folks who are tired of hearing [these] messages"); *id.* at 8 (statement of Rep. Cox) ("there is no

Notably, Congressman Tauzin pointed out with respect to the exemptions, that if consumers "still get political solicitations [and] nonprofit solicitations ... during the so-called dinner hour ... my suspicion is that [they] would think that the legislation was a fraud." *Know Your Caller Act Hearing* at 76.

There is zero difference in the nature of an intrusion caused by different types of calls, and the government's conclusion that the problem is "caused primarily by commercial entities" depends on asserted facts that neither the FTC nor FCC attempted to gather. The FCC declined even to request comments on the extent of problems caused by political, charitable, or religious calls, *FCC NPRM* at 1748-49, App. 893a-94a, despite its earlier finding that "all solicitation calling – whether for charitable, political, or business purposes – involves similar privacy implications," *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1035 (1980), and notwithstanding a congressional directive to study the issue. 47 U.S.C. § 227(c)(1)(D). For its part, the FTC frankly admitted there was no evidence in the record regarding the relative quantity of commercial versus noncommercial calls, and based its subsequent defense on this point entirely on industry estimates (which the agency disputed) of how much business would be lost under the DNCR. *See Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 284 F.Supp.2d 1266, 1269 (D. Colo. 2003) ("[t]here is nothing whatsoever in the administrative record or the record before this court, beyond the FTC's *ipse dixit*"). App. 65a. *See also* Do Not Call List Authorization Hearing, Jan. 8, 2003 at 34-35 (FTC admitted that it conducted no "studies or surveys" to determine which calls consumers find most annoying).[4]

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reason to grant preferred status to political calls, which are often the most annoying of all"); *id.* at 4 (statement of Rep. Barton) (registry should include political and charitable calls); *id.* at 30 (statement of Rep. Deal) (people will continue to get calls that bother them).

[4] Although the government does not suggest directly that the DNCR was enacted to address the issue of fraud, it does refer to the Tenth Circuit's erroneous conclusions on this point. Opp. 13. *But see* Pet. 12-13. However, any claim that commercial callers are more likely than non-commercial callers to engage in abusive behavior is undermined by the

With no evidence in the current record, the government bases its claim that commercial calls are the "overwhelming" source of unwanted telephone solicitations on a single reference in the 1991 House Report on the TCPA. Opp. 18. That one data point has proven so popular that the government cited it six times in its brief to the Tenth Circuit, [5] which in turn quoted it at least three times in its decision. *Mainstream Marketing Servs., Inc. v. Federal Trade Comm'n*, 358 F.3d 1228, 1235, 1240, 1241 (10th Cir. 2004). But the information in the House Report was never intended to carry the weight that the government now places on it. Congress collected information on complaints only from a handful of states (from a time before "do-not-call" laws existed), yet still concluded that charitable or political calls can "represent as serious a problem as commercial solicitations." [6] On that basis, it adopted "a special requirement" directing the FCC to monitor whether political and other noncommercial calls might require a future regulatory response. H. Rep. 102-317 at 16-17. Here, however, the FCC instructed commenters not to submit information on this point, *FCC NPRM* at 17478-79, App. 893a-94a, despite the fact the rulemaking proceeding was predicated on the need to account for "significant changes" in

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government's own previous representations to this Court. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003), 2002 WL 31907178, at *8 (detailing examples of abuse and "misrepresentations ... typical of the charitable solicitation frauds that the federal government prosecutes").

[5] Consolidated Opening Brief of the Government, *Mainstream Marketing Services, Inc. v. FTC*, No. 03-1429 (10th Cir., filed Oct. 17, 2003) at 6, 7, 26, 46, 47, 48.

[6] H. Rep. 102-317 at 16-17. The survey described in the House Report collected only "readily available" data from thirteen states, and reported specific findings on nine. In the remaining four states (New York, Nevada, Tennessee, and Washington), the survey concluded that calls were "mostly commercial," without disclosing whether the percentage was just over fifty percent or some higher proportion. Nor did it disclose how the term "commercial" was defined, or whether it corresponded to the categories set forth in the TCPA.

telemarketing since 1992. *FCC Order* at 14017. App. 590a. As a result, even if the government legitimately could convert the commercial speech issue from a doctrinal question involving speech classifications into a matter of pure empiricism, its failure in this case to seek updated data conflicts with this Court's most recent First Amendment jurisprudence requiring a reasonably current administrative record. *Cf. Ashcroft v. ACLU*, 124 S. Ct. 2783, 2794 (2004) (five-year-old findings in a rapidly changing area of technology considered inadequate to support First Amendment restrictions).

3. The government also ignores the fundamental problem of defining what speech qualifies as "commercial" and therefore subject to the more relaxed scrutiny of *Central Hudson*. *See Nike v. Kasky*, 539 U.S. 654 (2003). Pet. 20-21. It never attempts to correlate its claims that "commercial entities" cause most of the problems of unwanted calls with the exemptions and exclusions enforced by the DNCR or with the agencies' findings. The rules permit nonprofit entities to make sales calls but prohibit commercial speakers from making calls that do nothing more than promote their corporate image. *See* 16 C.F.R. §§ 310.2(bb), (cc), 310.4(b)(1)(iii)(A), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), (f)(6)-(7), (f)(9)(iii). Similarly, commercial callers may continue to call established customers, 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii); 47 C.F.R. § 64.1200(c)(2), (f)(9)(ii), while competitors in the same line of business may not make calls seeking new customers. 16 C.F.R. § 310.4(b)(1)(iii)(B); 47 C.F.R. § 64.1200(c)(2). It is a mystery how these distinctions correlate with the government's "findings" regarding the problems of commercial versus noncommercial telemarketing calls, [7] but they confirm that the commercial speech doctrine, which focuses on the specific nature of the speech to be regulated and its commercial effects, is ill-suited to cabin the arbitrary categories imposed by the DNCR.

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[7] The only study the FTC cited found that consumer preferences did not so much focus on whether the caller was commercial or noncommercial, but on whether it was local or community-based. *FTC Order* at 4593 (citing Michael A. Turner, *Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices* (Information Policy Institute, June 4, 2002)).

4. Just as it avoids the doctrinal questions, the government also misconstrues this Court's seminal holding regarding unwanted speech in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970). It tries to frame the question as a commercial speech issue by equating "commercial" with "unwanted" communications and claiming the DNCR blocks unwanted calls only at the consumer's request. Opp. 14. *See also id.* 12, 15, 19. But this utterly ignores the Petition's discussion of *Rowan*, which explained that this Court has invalidated restrictions where the government, not the individual, decides the categories of speech to be blocked, even in "opt-in" systems. Pet. 15-16. As the District Court found below, the mail regulations upheld in *Rowan* operate like the company-specific "do-not-call" rules because they leave entirely to the individual the choice of which communications to block, while the DNCR bans only categories of speakers selected by government fiat. *See Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 283 F.Supp.2d 1151, 1163 (D. Colo. 2003). App. 98a.

The government's failure to recognize this crucial distinction is well illustrated by its reliance on *Ashcroft v. ACLU*, 124 S. Ct. 2783, in which this Court observed that the voluntary use of Internet filtering software is less restrictive than direct regulation of content. Opp. 15. While it is undeniably true that a private decision to install filtering software in the home is less burdensome than a ban on speech, it does not follow that the First Amendment would allow the government to decide which websites must be blocked or permitted, even if the filters are installed voluntarily. And so it is with the DNCR. A consumer may decide whether or not to sign up for the registry, but it is the government that has chosen which calls are prohibited and which ones allowed. Such an approach is fundamentally incompatible with *Rowan*. 397 U.S. at 737 (opt-in system was designed "not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official").

II. The Opposition Misconstrues *Central Hudson*

1. Even if the DNCR is properly subject to *Central Hudson* intermediate scrutiny, review by this Court is needed because of the extent to which the Tenth Circuit misconstrued this Court's commercial speech jurisprudence. Although the Petition clearly articulated this issue, Pet. 23-28, the Opposition failed to respond directly or address this Court's most recent and relevant cases. Ignoring *Rubin* and *Greater New Orleans Broadcasting Ass'n.*, the Opposition, like the Tenth Circuit below, relies almost entirely on this Court's decision in *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993). Opp. 12, 15. However, contrary to the government's claim, *Edge* did *not* hold that an 11 percent reduction in "undesirable speech" is sufficient to show "material advancement" under *Central Hudson*. Pet. 22-26. *See Edge Broad. Co.*, 509 U.S. at 427-428 (lower courts "asked the wrong question"). As this Court subsequently explained in *Greater New Orleans Broadcasting*, 527 U.S. at 194-195 & n.8, the regulation in *Edge Broadcasting* was upheld only because the government interest in that case was limited to "supporting" state lottery laws. But where the government's purpose is reducing the total number of "undesirable" commercial communications – as it is here – arbitrary exemptions from coverage are fatal. *Id.* at 192-193; *Rubin*, 514 U.S. at 489. In this case the government has admitted it has no idea what proportion of unwanted calls the DNCR may prevent. [8] The dispute here is not just about the Tenth Circuit's evaluation of the factual record as the government asserts, Opp. 21; it is about that court's basic misreading of *Central Hudson*.

2. The government also misconstrues *Central Hudson's* narrow tailoring requirement, ignoring this Court's latest statement

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[8] 358 F.3d at 1240 n.11. App. 18a. Lacking record support, the government now cites an FTC press release celebrating the DNCR's first anniversary which quotes third-party public opinion polls. Opp. 15. No information is provided regarding how the polls were conducted and no explanation is offered as to why such data should be permitted to supplant missing record evidence. *See Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality op.) (declining invitation "to rest constitutional law on such uncertain foundations" as public opinion polls).

regarding less restrictive means in *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002). Consumers have a range of alternatives to block unwanted calls, including voluntary measures initiated by industry, market-based solutions, and less restrictive regulations. Contrary to the government's claim, Petitioners have never relied "solely" on company-specific "do-not-call" rules to protect consumers' interests. Opp. 16. *See* Pet. 28 (listing other less restrictive regulations).

Throughout the rulemaking proceedings, Petitioners explained that the TCPA was predicated on the assumption that no market-based blocking solutions existed to address concerns over telemarketing, Pub. L. No. 102-243, § 2(11), 105 Stat. 2394 (1991), but since its passage a range of technology-based alternatives evolved to give individuals a great deal of choice about the type and volume of calls they receive. Such measures include inexpensive hardware that consumers can install to block unwanted calls, as well as network-based services, such as Caller ID, that the new rules support. 16 C.F.R. § 310.4(a)(7); 47 C.F.R. § 64.1601(e). This Court recently found that such market-based measures can be more effective than regulation because they are not limited in their application to the categories set forth in the law. *Ashcroft*, 124 S. Ct. at 2792-93. Other less restrictive rules, such as the regulations governing predictive dialers, further undermine justifications for the DNCR.[9]

The government's claim that the company-specific rules "failed" overlooks the fact that almost no consumers knew they existed and the agencies never publicized or enforced them. Pet. 4-5, 27-28. Additionally, its conclusion that company-specific rules are excessively "burdensome" is not supported by the record. The government asserted without support in its briefs below that each consumer would be required to make "thousands" of individual requests, but the Tenth Circuit observed that the actual number

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[9] 16 C.F.R. § 310.4(b)(1)(iv); 47 C.F.R. § 64.1200(a)(5)-(6). The FCC estimated that 41 percent of all telemarketing calls were "abandoned calls" placed by predictive dialers. App. 597a n.28.

amounts to an average 2.64 calls per week to each household.[10] This number, however, represents all telemarketing calls, including abandoned calls and calls from political and charitable sources. The record before the agencies indicated that the "burden" is closer to one request per week, which is hardly unreasonable. Pet. 27-28 n.15. Petitioners also advocated additional measures to bolster such rules, such as allowing consumers to sign up and verify compliance online or by using toll-free numbers. *See FCC Order* at 14068. App. 679a. The government's failure to seriously consider such less restrictive measures cannot be reconciled with its obligations under the First Amendment. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 758-759 (1996).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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[10] 358 F.3d at 1240, App. 18a. The Court concluded that company-specific rules are too burdensome, but did so by aggregating the total number of requests by all consumers for all calls in the U.S. on an annual basis. The more appropriate measure, however, is whether a given consumer can block calls he or she does not want, as in *Rowan*.